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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CHRISTOPHER E., a Person Coming  
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

GILBERT E.,

Defendant and Appellant.

G033957

(Super. Ct. No. DP009540)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carolyn Kirkwood, Judge, and Gene Axelrod, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Affirmed in part and reversed in part.

Marsha Faith Levine, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Beth L. Lewis, Deputy County  
Counsel, for Plaintiff and Respondent.

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Gilbert E. appeals from a judgment of the juvenile court declaring his biological son Christopher E. to be a dependent child. He argues the court erred by finding Christopher's stepfather Rollin H. to be Christopher's presumed father. Gilbert also contests the court's finding under Welfare and Institutions Code section 300, subdivision (d),<sup>1</sup> that there exists a substantial risk of harm to Christopher's half-sibling Jessica because her parents failed to protect her from sexual abuse by Gilbert 13 years earlier, arguing the evidence was insufficient to support a finding of present risk to the girl. We agree with his first contention, and further conclude the record does not support a finding of a substantial risk of sexual abuse as to Christopher E.

## I

On December 11, 2003, police officers were summoned to the home shared by Rollin H., his wife Rhonda, their daughters Julia (age 4) and Renee (age 2), and Rhonda's children from previous relationships, Jessica (age 15) and Christopher (age 13). A heated argument between Rollin and Christopher erupted into physical violence, prompting Jessica to call police for help. Investigating officers arrested Rollin for child abuse but left the children with their mother. When Rhonda posted Rollin's bail and allowed him to return home the next day, investigators intervened and placed the children in protective custody. The Orange County Social Services Agency (SSA) filed a petition alleging the children had been physically and emotionally abused and subjected to domestic violence. (§ 300, subds. (a)-(c).)

The petition listed Gilbert E. as Christopher's alleged father after Rhonda informed SSA he was Christopher's biological father. Gilbert, identified as the boy's father on the birth certificate, lived with Rhonda, Jessica, and Christopher off and on through June 1991. He last saw Christopher in 1993. Rhonda explained she prohibited further visits with Gilbert when the boy returned home from a visit and said "'My daddy says he's gonna kill you.'" Christopher told a social worker he had never seen his

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

biological father and had no relationship with him. Gilbert paid court-ordered support to reimburse the county for public assistance to Rhonda and Christopher through 1998. SSA located him after the children were detained. Based on accusations from Rhonda and the maternal great-grandmother, Shirley K., SSA filed an amended petition alleging Gilbert had sexually abused Jessica shortly before July 1991.

Rhonda and Rollin pleaded no contest to the petition. Gilbert contested the sexual abuse allegation and the jurisdictional hearing was tried in February and March 2004. The juvenile court found Rollin to be Christopher's presumed father, and sustained the sexual abuse count. At the disposition hearing, Gilbert did not seek reunification services, but requested visitation with Christopher for himself and the paternal grandmother, Isabel R. Christopher, still fearful of Rollin, did not want to return home, nor did Rollin want him to return. Christopher expressed interest in visiting Gilbert and his paternal grandmother, and the court permitted monitored visitation.

## II

Gilbert argues the court erred in finding Rollin to be the boy's presumptive father and in failing to name him as Christopher's presumed father. We agree in part.

Dependency law recognizes three types of fathers: presumed, alleged and biological. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15; see § 361.5; compare *In re Crystal J.* (2001) 92 Cal.App.4th 186, 190 [recognizing a fourth category of "de facto fathers" for those who have assumed the role of parent on a day-to-day basis].) A presumed father is a man who meets one or more statutorily specified criteria. (Fam. Code, § 7611.) Only a presumed father is entitled to receive reunification services to regain custody of a dependent child (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 451), although the juvenile court may provide services for the child and biological father if it determines that the services will benefit the child (§ 361.5, subd. (a)).

"Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, 'there can be only one presumed father.'" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603.) Because section 7611 contains no automatic preference for biological fathers, "biological paternity by a competing presumed father

does not necessarily defeat a nonbiological father's presumption of paternity.” (*Id.* at p. 604.) If more than one person qualifies as a presumed father under the statutory criteria, the juvenile court weighs the conflicting presumptions and adopts the one “founded on the weightier considerations of policy and logic . . . .” (Fam. Code, § 7612, subd. (b).) “The paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child” and reflects a legislative goal of preserving an existing parent-child relationship that affords a child social and emotional strength and stability. (*Steven W. v. Matthew S.*, *supra*, 33 Cal.App.4th at p. 1116.)

One who claims he is entitled to presumed father status has the burden of establishing, by a preponderance of the evidence, the facts supporting that entitlement. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.) The juvenile court's finding of presumed father status will be upheld if it is supported by substantial evidence. (*Id.* at p. 1652.)

Here, the juvenile court found both Gilbert and Rollin qualified for presumed father status, but concluded the particular circumstances favored Rollin as the presumed father. The court was concerned that Gilbert had not seen Christopher for more than a decade, explaining, “[h]e’s had no communication with Christopher, either in person, telephonically or by letter. There’s been no support paid since 1998. [¶] . . . And the court doesn’t find since 1993 or thereabouts there have been any attempts to contact or find . . . Christopher. [¶] However, the court does note that [Gilbert’s] name appears on [Christopher’s] birth certificate, and that [Gilbert] lived with the child for a period of time after [the] birth. [¶] [Rollin] has lived with Jessica and Christopher as their father for a number of years now. He has participated with the children in their school activities. Both children have taken his name. His name, the [H.] name, appears on the children’s educational records . . . . [¶] [Rollin] is very involved in Christopher’s sports activities and academic activities. He is as well involved in Jessica’s artwork at her school . . . . [¶] The court recalls the testimony of Jessica when she testified she would frequently use the term ‘father’ and correct herself to stepfather. It was clear to

this court that she sees [Rollin] as a parental figure. [¶] I think the law is clear that the role of father is to be viewed from the eyes of the child more than just mere biology. So I do see that this case has competing presumptions. [¶] The court is going to find that the more reasonable decision would be that [Rollin] be deemed the presumptive father for Christopher . . . .”

Family Code section 7611, subdivision (d), the sole basis for the court’s finding Rollin was the presumed father, applies where the man “receives the child into his home and openly holds out the child as his *natural* child.” (Italics added.) Rollin began living with Rhonda when Christopher was three. The children used Rollin’s last name at school, and by all accounts Rollin acted in a parental role towards Christopher. But there was no evidence he claimed to be anything other than Christopher’s stepfather. As we have noted, the law does not condition a finding of presumed father on the existence of a biological relationship. But Rollin had the burden of proving both that he received Christopher into his home *and* openly held him out as his *natural* child. (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1652.) Because there was no evidence he openly held out Christopher as his natural child, the court erred in granting Rollin presumed father status.

*In re Nicholas H.* (2002) 28 Cal.4th 56 is distinguishable. There, the putative presumed father, Thomas, participated in Nicholas’s birth, was listed on Nicholas’s birth certificate as his father, and provided a home for the mother and child for several years. He took legal action to establish a parental relationship when the mother later tried to prevent him from seeing Nicholas. Thomas “consistently referred to and treated Nicholas as his son.” (*In re Nicholas H.*, *supra*, 28 Cal.4th at p. 61.) The mother nevertheless claimed another man who had not come forward to assert any parental rights was Nicholas’s biological father (*ibid.*), and Thomas admitted at the trial he was not the biological father. The appellate court concluded Thomas’s in-court admission he was not Nicholas’s biological father, in addition to the mother’s testimony, necessarily rebutted the presumption under Family Code section 7611, subdivision (d). The California

Supreme Court reversed the appellate court, concluding a man does not lose his status as a presumed father by admitting he is not the biological father.

In contrast, Rollin was not listed on the birth certificate, did not participate in the birth, never took legal action to establish a parental relationship with Christopher, and never claimed Christopher was his natural son. Indeed, Rhonda testified they took no action precisely because they expected resistance from Gilbert. True, Rollin actively participated in Christopher's life as provider, tutor, and coach. But Rollin held himself out as Christopher's stepfather, which falls short of the requirement he "openly and publicly admit paternity" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051), and therefore did not qualify for presumed father status. We may not rewrite the statute to eliminate the requirement that a man openly hold out the child as his *natural* child. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652.) When the statutory language is clear and unambiguous, as in this case, it controls. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Moreover, we note Rollin caused the onset of dependency proceedings by physically abusing Christopher, blamed the boy for family discord, and did not want Christopher to return home. Although SSA urged the court to name Rollin the presumed father, there is no evidence Rollin requested this designation. Thus, Rollin's actions fell short of the statutory requirement he hold the child out as his own, and designating him as the presumed father did not further the statutory goal of preserving family integrity.

We decline Gilbert's request to direct the juvenile court to find *he* is Christopher's presumed father, however. That determination is better left to the juvenile court in the first instance.

### III

Gilbert requests reversal of the juvenile court's sustaining of the section 300, subdivision (d)<sup>2</sup> allegation, that there exists a risk to Jessica "and her

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<sup>2</sup> Per section 300, subdivision (d), a child falls under the juvenile court's jurisdiction if "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or

siblings” because of abuse committed by Gilbert 13 years earlier when Jessica was three years old. Gilbert acknowledges a reviewing court need not consider attacks on particular jurisdictional findings if other valid grounds support the court’s jurisdiction over the children (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875), but urges us to review the court’s finding because it may affect his relationship with Christopher. We agree this jurisdictional finding must be reversed as to Christopher.

True, substantial evidence supports the court’s conclusion the abuse occurred, for the court found credible the testimony of Jessica, her mother, and great-grandmother. But the record contained no evidence Gilbert posed a present risk to boys of Christopher’s age. *In re Karen R.* (2001) 95 Cal.App.4th 84 (*Karen R.*) concluded that sexual abuse of a female child by her father *while her siblings were present in the home* was sufficient for the juvenile court to find a substantial risk of harm to the male siblings. (*Id.* at pp. 89-90.) And section 355.1, subdivision (d), provides that a finding made in a prior criminal or dependency proceeding that a parent or other person has engaged in sexual abuse is *prima facie* evidence of substantial risk to a child *living in the home*, irrespective of gender.

But these authorities are inapposite precisely because the home life Gilbert once shared with Jessica and Christopher ceased to exist in June 1991. The *Karen R.* court based its conclusion on the fact that, in the presence of the male sibling, the mother and father denied the daughter’s allegation of rape, humiliated her, and physically abused

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her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.”

Curiously, SSA failed to include an allegation under section 300, subdivision (j), which places a child within the juvenile court’s jurisdiction if “[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.”

her in front of the boy, such that “a normal child . . . would have been greatly disturbed and annoyed at having witnessed these events.” (*Karen R.*, *supra*, 95 Cal.App.4th at p. 90; see also *In re Lisa D.* (1978) 81 Cal.App.3d 192, 197 [seeing father-figure grope sister’s breasts was “obviously conducive to psychological trauma to the eight-year-old boy”].) Here, there is no similar risk of harm to Christopher, given that he and Jessica are in separate placements and nothing in the record suggests Gilbert will have any contact with the two of them together. Thus, no evidence suggests a risk of present harm to Christopher, and the finding must be reversed. (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 199.)

#### IV

The juvenile court’s finding Rollin H. is the presumed father of Christopher E. is reversed, and the section 300, subdivision (d), finding of a substantial risk of sexual abuse is reversed as to Christopher E. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O’LEARY, J.